

STATE OF MICHIGAN  
IN THE SUPREME COURT

*\* Pnd*  
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THE PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellant,

vs.

ANTHONY JUNIOR JOHNSON  
Defendant-Appellee.

*06*  
No.

\_\_\_\_\_  
Lower Court No. 02-011051  
COA No. 246937

*Wayne CRI D. Ryan*  
*op 10/14/04*

127434

APPL

APPLICATION FOR LEAVE TO APPEAL

12/14

26679

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## STATEMENT OF THE QUESTION

### I.

A defendant is entitled to an included-offense instruction when on the facts a rational jury could conclude that the lesser rather than the greater offense was committed. Here the trial judge erroneously held that an included-offense instruction is precluded when alibi is claimed, and counsel chose the manslaughter instruction over an alibi. Was the error of the trial judge harmless where the included offense was unsupported by the evidence, and the choice by counsel was a reasonable one?

Defendant answers: "YES"

The People answer: "NO"

## STATEMENT OF FACTS

Testimony from trial showed the following.

Freddie McClodden was the father of the deceased, Freddie Bishop and identified the body at the Wayne County Morgue on August 13, 2002. (II;7-69-70)

On August 13, 2002, at about 4:00 a.m., McClodden saw a burgundy car on the next street, State Fair, in the middle of the street. McClodden could see through the driveway as the driveway of a school leads straight into the driveway of his home. McClodden knew that the defendant lived over there on State Fair. McClodden could see the burgundy car while sitting on the front porch, mourning the death of his son. His attention was called to the car when he heard three gunshots. McClodden did not know who fired the shots. (II;70-74)

Eugene Fisher knew Freddie Bishop for about 13 years. Fisher also knew the defendant. On August 13, 2002, Fisher was with Freddie Bishop and James Robinson at about 12:00 a.m. They were at a bus stop at 7 Mile and Hayes waiting for Fisher to get a bus to go home. Fisher was aware of an ongoing dispute between Freddie Bishop and the defendant. Fisher had seen small quarrels between Freddie Bishop and the defendant. (II;76-78) James Robinson had known Freddie Bishop for about 10 years. Robinson also knew the defendant. (II;125-126)

Fisher was standing with his back toward the street, and Freddie Bishop and Robinson were facing the street, Seven Mile. While standing there, Fisher and Robinson noticed a red dot, a beam, on Freddie Bishop's shirt. It was on the left side of Freddie Bishop's chest, only for a second or two. A shot rang out, loudly, and Freddie Bishop began to run. Freddie Bishop jerked, spun around, and began to run. Immediately after that first shot there were many more shots. Fisher was just a foot

or so away from Robinson and Freddie Bishop. The shots were coming from directly behind Fisher. He looked behind and saw a gray, older model Cadillac. The Cadillac had not been there before the shooting started.

When Fisher turned and saw the Cadillac he saw James Robinson stumble and fall. Fisher saw glass breaking and observed two people who asked him if he knew who was doing the shooting. Fisher turned and looked at the car. He observed two people, the driver and someone in the front passenger seat. Fisher could not identify the people. The shooting was coming from the front passenger seat as the sparks were coming from that area of the car. *A hand was coming out from the car and it held an automatic weapon.* The gun was shooting rapidly, and sparks could be seen coming from the gun. *Fisher observed the red beam coming from the weapon.* (II;79-86 and 125-131) The gun looked to be a .45 or .42 caliber weapon. (II;106) Robinson thought the gun was a semiautomatic because of the sound. (II;135)

Robinson was hit in the back of the head, fell, and hit the passenger side of the car he was standing next to. He was hit while the gunshots were ringing out, causing him to fall to his knees. He hid behind the car. (II;131-132)

Fisher saw Freddie Bishop run, but did not know whether or not he was hit. Bishop ran towards the alley. Fisher lost sight of Bishop and thought he had gotten away. Fisher ran around to the front of the tire shop. He started screaming for James Robinson and Freddie Bishop. Bishop did not respond. Fisher found Robinson in front of the building and noticed a gash to the back of Robinson's head. Fisher had felt the bullets "zing" past him. The bus stop was completely shattered with glass all over the place. The gray Cadillac pulled off. Fisher and Robinson walked continued down the alley as they had not found Freddie Bishop. They called EMS and went back to Seven Mile

and Hayes. Fisher then saw EMS picking Freddie Bishop up from near the clinic where Bishop had run. Fisher then went to tell Freddie Bishop's family. (II;87-93 and 133) Fisher tried calling Freddie Bishop on his cell phone, but there was no answer. (II;114) Robinson did not recall looking for Bishop. (II; 148) Robinson was brought to the hospital by a friend as the ambulance never came for him. Something had hit him in the back of the head, although he does not know if it was glass or something else. (II;136,146)

Fisher went to the hospital with Robinson's grandfather. Fisher was told that the police wanted to talk to him. (II;93)

Fisher knew who the GD's were. The GD stood for Gangster Disciples and there were about 25 members. Fisher was aware that the defendant was a member. Fisher knew that the GD's associated across the street, on State Fair. Freddie Bishop lived on Tacoma which was the next street over. Fisher did not know if Freddie Bishop belonged to a gang, but knew Bishop had friends. Fisher had seen Freddie Bishop with other members of the GD's in feuding situations, which had not involved physical action, just words. Fisher had seen Freddie Bishop once, in 1997, with a gun. (II;93-96) Fisher did not know whether Robinson and Freddie Bishop were members of gangs. (II;114)

Robinson testified he had been a member of a gang called the Ruthless Gang. Both Fisher and Freddie Bishop were affiliated with the gang. (II;149)

Odell Warmesley was with his girlfriend, Dayna Owens in the area of Seven Miles and Hayes on August 13, 2002 about 12:00 a.m. They were walking past the bus stop in that area, coming from a gas station. Warmesley saw three men at the bus stop. He did not know the men. While walking past the bus stop, about 20 feet away, gunshots were fired. There were many shots fired. There were

three cars turning the corner, the last of which was a gray Cadillac. It appeared as if there were two people in the Cadillac. Warmasley did not know what condition the bus stop was in after the shooting until he came back to the nearby coney island 30 to 45 minutes after the shooting. (II;155-163) There were two people in the front seat. (II;170)

When Warmasley returned to the Coney Island the police called to him and he told the police what he saw. He had run when the shooting started. (II:164-165) Owens also spoke to the police when she returned to the scene later. (II;180)

Dayna Owens was with Warmasley on the night in question. She observed several cars turn the corner from Hayes. The last car, a big, older car, started firing shots, six or seven, close together. The shots were coming from the primed Cadillac. Owens could see smoke, and that is why she first believed they were firecrackers. Owens did not see anyone with a gun, but saw the smoke coming from the car. None of the men at the bus stop had a gun. When she heard the shots, she started running. Owens and Warmasley ran back to the Jets Pizza and waited until everything was done. She was afraid. As she ran, Eugene, one of the men at the bus stop ran past her. She asked if he was hit and he said, no, after he felt over himself. (II:172-178)

Detroit Police Officer Brett, Riccinto was called to the area of 15625 East State Fair, in Detroit on August 13, 2002 around 4:00 a.m. for a firebombing that had just occurred at that location. The single story residence was on fire when he arrived, and his role was crowd control. There was a lot of neighbors outside and much confusion. The fire department put out the fire. Riccinto was required to remain at the scene and secure the scene and impound a vehicle that was at the back of the address. The car was a 1986 green Chevy and parked in the driveway. (II;182-186)



When arriving at the scene Riccinto saw the defendant and heard defendant give his name to another officer. (II;189)

Riccinto and his partner were waiting for the tow truck and finishing the paperwork while sitting in a fully marked scout car. He observed a black male walk in front of the house and up the driveway. The male walked towards the rear of the house. Riccinto identified the person as J.B. Brown. Riccinto lost sight of the person for a moment then saw him crouching down at the corner of the garage, as if reaching for something or observing something. J.B. Brown turned and looked at the officer who then detained Brown. Riccinto observed a loaded .357 magnum right at the corner of the garage. The gun, People's Exhibit 2, had a pressure sensitive laser attached. When the pressure part on the handle is pressed, a laser light, a red dot, would be emitted. The gun was loaded with three live rounds. Riccinto believed three spent casings were found with the weapon. (II;187-193) Riccinto knew that with this type of revolver a casing is not expelled. The cartridge stays in the cylinder, as opposed to an automatic weapon where the spent casings are ejected from the top. (III;194;196) The .357 magnum gun would use either .357 or .38 caliber cartridges. (II;201)

Dr. Paul Nora was the fellow medical resident in the Wayne County Medical Examiner's Office and performed the autopsy on Freddie Devon Bishop on August 13, 2002. (II;203-206) A single gunshot wound to the left chest was found, just below the nipple. There was no exit wound. There was no evidence of stippling around the entrance wound, which would have characterized the entrance wound as one with close range firing. The bullet went through the left chest, came along the right heart, entered the right chest cavity, punctured the right upper lobe of the lung, and ended in the right chest cavity floating free in the blood that was there. There was a perforation to the right ventricle of the heart. The bullet entered the apex of the heart and exited at the base of the heart.

This type of injury is lethal. A deformed large caliber, non-jacketed bullet was recovered from the right chest cavity. (II;206-211) Bishop died of a single gunshot wound to the chest, which was classified as a homicide. (II;212) People's Exhibit 3 was the bullet recovered. (II;212-214)

There were two tatoos on the deceased. One said, "Only the Strong survive." The other said, "Ruthless." (II:217-218)

Sgt. Danny Reed, Detroit Police Department, testified he was a firearms identification expert for the police department. Sgt. Reed examined the gun, People's Exhibit 2, and identified it as a Stern Ruger .357, model GP-100, stainless steel, four-inch class characteristics four right, with a serial number of 17299510. The bullet recovered from Bishop's body, People's Exhibit 3, was examined and compared to the gun. The bullet was the same caliber and could be fired from the gun. There was too much damage to the bullet to make a determination that it was fired from the weapon. Reed was not able to rule out that the bullet did not come from the gun. (II:220-226) There was a laser attached to the gun. (II;226)

Detroit Police Officer Gregory Barrett was with his partner, Officer James Forrest on August 13, 2002 around 12:00 or 1:00 a.m. They received a run to the area of Hayes and Seven Mile as there was a shooting and a man down. When he pulled to that location he observed a young black male on the ground, unresponsive. He was found between the auto repair building and another building. Barrett noticed blood on the t-shirt, but also noted that his jogging pants were pulled down part of the way, between the knees and hips, to the point where his genitals were exposed and the t-shirt was pulled up and appeared folded as if someone had pulled it up. The male was unconscious. The officer notified EMS. (II:230-233) Barrett was the first officer on the scene. He arrived about five minutes after he received the run at 12:05 a.m. (II;240)

Barrett looked around the scene and did not locate any spent casings or fired shells. There were no extracted cartridges. (II;234-235;246) Barrett searched from the Coney Island restaurant, across the street from the bus stop, to the area of the bus stop, and then to the area where the deceased was found. (II;244) Barrett went into a restaurant across the street and spoke to the employee. After receiving information from the employee, he spoke to other people and passed the information on to the officer in charge. (II;236) No weapon was found around the body of Bishop, the deceased. (II;247)

Barrett was then dispatched to the scene on East State Fair to assist officers at that location. At the location, Barrett spoke to his supervisor. After that conversation, Barrett got out of his car. He noted a sergeant from Homicide was there and that a J.B. Brown was detained. Barrett had to convey Brown to the Homicide officers. (II;236-239)

It was determined that the defendant lived at the State Fair address where the firebombing took place. (II;193)

Detroit Police Officer Anthony AVECILLA responded to the area of Seven Mile and Hayes with his partner, Officer Campbell. They were to back up another scout car at a shooting scene. Upon arrival they were looking in the area for a victim, who was found 30 to 35 feet from the bus stop, off to the side of the auto repair shop. (II;248-249) AVECILLA and his partner went to St. John's hospital with the victim in order to get information. While at the hospital AVECILLA received information that there was a witness, James Robinson, with a superficial wound to the head. There was another witness, Eugene Fisher, who came to the hospital. AVECILLA's partner did most of the talking with the witness, but the two officers were there to maintain the scene and keep the witnesses at the hospital until homicide arrived. AVECILLA helped to collect clothing of the deceased and Michigan

identification, which was then brought to homicide office. (II:250-253) Avecilla did not recall seeing any shell casings. (II:254)

Detroit Police Officer Roy Coleman was working with Officer Riccinto on August 13, 2002 and went to the scene of the firebombing on East State Fair. The house was on fire and people were in the neighborhood. Officer Coleman spoke with the defendant at the scene. Defendant was with his family and not in custody, but with family members, Louise Brown, Linda Johnson, Richard Shurgill, and Antonio Johnson. It was Officer Coleman's understanding that the house on fire was the defendant's house, so Coleman asked defendant if he had seen anyone. Defendant said he saw someone running westbound from the house. Coleman asked defendant if he was having problems with anyone, and immediately defendant said, "Freddie B." After this conversation, Officer Coleman notified his lieutenant and notified Scout 9-2, which had been involved earlier with the homicide of Freddie Bishop. Coleman was aware that Freddie Bishop had been killed. Coleman and his partner waited at the location for the evidence techs to show up. Coleman's partner confiscated the weapon and arrested J.B. Brown who was related to the Browns that were with the defendant earlier. Coleman waited for Sgt. Anderson of homicide to arrive. (II:256-263)

Detroit Police Investigator Barbara Simon was the officer in charge of this case and met with the defendant on August 13, 2002 about 12:00 p.m. at the homicide section. She gave the defendant his Constitutional Rights and a statement was taken from the defendant by Inv. Simon. Simon talked with the defendant and he gave a version of what took place, which Simon wrote out. Defendant was given an opportunity to read the statement. Defendant was asked if each statement was correct and

he signed his name behind each answer. Simon did not recall the defendant making any changes to the statement. The interview took over an hour. (III<sup>1</sup>;6-15)

Defendant's statement, People's Exhibit 4, was as follows:

Question: Mr. Johnson, what can you tell me regarding the fatal shooting of Mr. Freddie Bishop?

Answer: All this started a long time ago, over street gangs and we used to fight each other. Freddie and his boys robbed my friend, Demetrius Donahue (phonetic), black male, 21, who used to deliver pizzas. The beef has been going on and on and on. About a month ago, my friend's car got shot up. His car was in my driveway. The next day I saw Freddie B. and some of his boys riding down the street. I got on my bike and I went around the corner, me and two of my friends. I said, 'Nigger, why did you shoot up my house?' [sic] I was talking to Freddie Bishop. Me and Freddie B. got into an argument and we all started fighting. It was three on three. The next time I saw Freddie B. was Sunday, 8/11/02. Freddie B. came to my house. He was looking for the guy who he had got into, into it when we all were out there fighting. Freddie B. ten pulled up his shirt, he had a gun. He pulled the gun out. He didn't shoot the gun. Monday night, 8/12/02, I was in a car with Eastwood, unknown first and last name, we were driving down East Seven Mile and Hayes. I think Eastwood said, There's Freddie Bishop. [sic] I had my gun. We drove up. I pointed my gun out he window and started shooting at them and we just drove off. After the shooting we rode around for a while and then I went home.

Question: What kind of gun did you have?

Answer: A .357. It had a laser on it.  
And he signed his name, Anthony Johnson.

Question: Mr. Johnson, how many times did you fire your gun?

Answer: I don't know for sure.  
And he signed his name Anthony Johnson.

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<sup>1</sup>Volume III of the trial is dated on the cover as November 25, 2002, but the trial court summarized the preceding days witnesses on pages 4 and 5. It is clear from the summary that this was the third day of trial with an incorrect date on the cover.

Question: Mr. Johnson, how long have you known Freddie Bishop?

Answer: I known him for sometime. We used to smoke weed together. That's why all of this is so crazy. We used to be friends. And he signed his name, Anthony Johnson.

Question Mr. Johnson, what happened to the gun?

Answer: I think the police got it.  
And his signed his name, Anthony Johnson. [sic]

Question: Mr. Johnson do you know Eastwood's real name?

Answer: No.  
And he signed his name, Anthony Johnson.

Question: Mr. Johnson, did you see Freddie B. or anyone with him with a gun?

Answer: No.  
And he signed his name, Anthony Johnson.

(III;16-18) The remainder of the statement was questions and answers regarding whether threats or promises had been made. The defendant stated that he used to belong to the G.B. gang. Defendant said he was sorry and he was just shooting. He didn't mean for anyone to get hurt. (III;19)

Defendant had been in homicide when Simon reported for work at 8:00 a.m. Simon reviewed the first statement defendant had made to the police, which was made at 6:15 a.m.(III;22-26) Simon knew from reading the initial statement that the defendant had denied involvement in the shooting. (II;26-29)

Defendant was convicted of first-degree murder, two counts of felonious assault, and felony-firearm. He had requested an instruction on manslaughter, but the trial judge held that defendant was not permitted an instruction on involuntary manslaughter, as requested if he claimed alibi. Defendant was given the choice, then, of pursuing the alibi defense, or receiving a manslaughter

instruction. Defendant chose the instruction, and presented no alibi defense. It was because of this ruling by the trial judge that the Court of Appeals reversed. The People seek leave.

## Argument

### I.

**A defendant is entitled to an included-offense instruction when on the facts a rational jury could conclude that the lesser rather than the greater offense was committed. Here the trial judge erroneously held that an included-offense instruction is precluded when alibi is claimed, and counsel chose the manslaughter instruction over the alibi. The error of the trial judge was harmless where the included offense was unsupported by the evidence, and the choice by counsel was a reasonable one.**

This is an odd case. The defendant at trial made a request for manslaughter jury instruction. The trial court was incorrect in stating that the defendant could, based on the evidence, receive a manslaughter instruction, for, as will be discussed, there was no evidence of any gross negligence in the killing. Though manslaughter is an included offense of murder,<sup>2</sup> an instruction should only be given on request where a rational factfinder could find the defendant committed the lesser rather than the greater offense.<sup>3</sup>

#### **A. The Facts Did Not Support A Voluntary Manslaughter Instruction**

The Court of Appeals stated here in conclusory fashion that “Because there was evidence supporting instructions on the lesser included offenses as well as the alibi defense, we hold that the limitation imposed by the trial court was error. Reversal of defendant’s convictions is required because the prosecution has failed to show that the error was harmless beyond a reasonable doubt.”<sup>4</sup>

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<sup>2</sup> *People v Mendoza*, 468 Mich 527 (2003).

<sup>3</sup> *People v Cornell*, 466 Mich 355 (2002).

<sup>4</sup> Slip opinion, at 2.



But the facts in this case provide no evidence whatever that would support a finding that the shooting was the result of gross negligence rather than deliberate. The deceased was standing at the bus stop with the other victims. *A red laser target light was seen on the deceased's chest* by the other assaulted victims, just before the deceased was shot. This was not merely a random shot or accidental shot—there was a planned attack on the deceased by the defendant, and the bus stop at which the deceased and the other victims were standing was shot to pieces by a large number of shots. Both the trial judge and the Court of Appeals erred in finding that a rational factfinding could find this shooting was the result of gross negligence.

#### **B. Prejudice**

Defense counsel was given a choice, then, between receiving a manslaughter instruction to which defendant was *not* entitled, or an alibi defense to which he *was* entitled. He chose the manslaughter instruction. Defendant should have received an alibi instruction but no manslaughter instruction. This error, if viewed as constitutional, is harmless beyond a reasonable doubt, for even when no alibi instruction is given, the jury is still instructed, as a matter of instruction on the elements, that it must find that *defendant committed the charged act*. That the jurors' attention is not called once again and specially to this point by an alibi instruction is not constitutional error, so long as the jurors understand from the instructions that if the defendant did not commit the act (which would be true if he were elsewhere), then he must be found not guilty. Indeed, this court has said that failure to give an unrequested alibi instruction is not reversible error

so long as the court gives a proper instruction on the elements of the offense and on the requirement that the prosecution prove each element beyond a reasonable doubt.

Because no instruction on alibi was requested at this trial, and the trial court did properly instruct on the prosecution's burden of proving every element of the offense, it was not reversible error here for the trial court to fail to give an alibi instruction.<sup>5</sup>

Defense counsel's choice to proceed in this fashion, given the choice given him by the trial judge, was sound, and the error of the court was not prejudicial.<sup>6</sup>

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<sup>5</sup> *People v Burden*, 395 Mich 462, 467 (1975).


<sup>6</sup> And see *People v Boyd*, 470 Mich. 363, 378 (2004) : here defense counsel, if he believed the trial judge was wrong, could have proceeded as he saw fit with the alibi, with his request for the manslaughter instruction preserved for appeal.

**RELIEF**

WHEREFORE, the People respectfully request this Honorable Court to grant leave to appeal,  
and find that the error that occurred here was not prejudicial.

Respectfully submitted,

KYM L. WORTHY  
Prosecuting Attorney  
County of Wayne



TIMOTHY A. BAUGHMAN  
Chief of Research, Training,  
and Appeals

**STATE OF MICHIGAN  
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THE PEOPLE OF THE STATE OF MICHIGAN,  
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Lower Court No. 02-011051  
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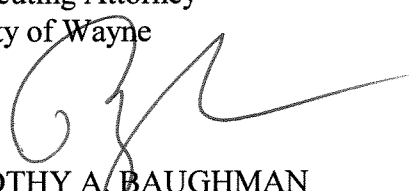
**NOTICE OF HEARING**

TO: PETER JON VAN HOEK  
Assistant Defender  
3300 Penobscot Building  
Detroit, Michigan 48226

PLEASE TAKE NOTICE that the attached APPLICATION FOR LEAVE TO APPEAL will be brought on for hearing in the Michigan Supreme Court at Lansing, Michigan on Tuesday, December 7, 2004.

Respectfully submitted,

KYM L. WORTHY  
Prosecuting Attorney  
County of Wayne



TIMOTHY A. BAUGHMAN  
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Plaintiff-Appellant,

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ANTHONY JUNIOR JOHNSON,

Defendant - Appellee.

Lower Court No. 02-011051

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**PROOF OF SERVICE**

STATE OF MICHIGAN)

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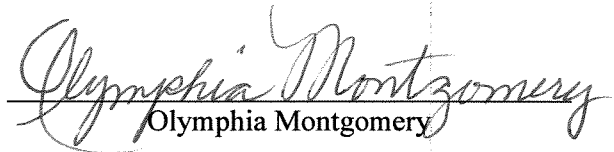
COUNTY OF WAYNE)

The undersigned deponent, being duly sworn, deposes and says that she served a true copy of **NOTICE OF HEARING and APPLICATION FOR LEAVE TO APPEAL** upon:

PETER JON VAN HOEK (P-26615)

The within named attorney for defendant, by DEPOSITING SAID PLEADING IN THE U.S. MAIL IN THE CITY OF DETROIT, enclosed in an envelope bearing postage fully prepaid on NOVEMBER 15, 2004, plainly addressed as follows:

PETER JON VAN HOEK  
Assistant Defender  
3300 Penobscot Building  
645 Griswold Avenue  
Detroit, Michigan 48226

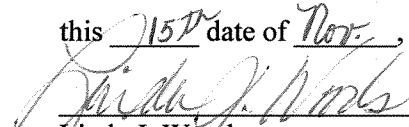
  
Olympia Montgomery

And said pleading was filed in the Supreme Court, by PERSONAL SERVICE at the following address:

CLERK OF THE SUPREME COURT  
2<sup>nd</sup> Floor Law Bldg.  
525 W. Ottawa Street  
P.O. Box 30052  
Lansing, Michigan 48909

Subscribed and sworn to before me

this 15<sup>th</sup> date of Nov., 2004

  
Linda J. Woods

Notary Public, Wayne County, Michigan  
My commission expires on 7/3/2007